United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7180

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

P/s

TRAMP SHIPPING CO., INC.,
Plaintiff-Appellee,

—against—

GOTAAS LARSEN A.S., SANKO STEAMSHIP CO., LTD., PARABOLA SHIPPING UK LTD., HIMOFF MARITIME ENTERPRISES, LTD.,
Defendants-Appellees,

and

—against—

EMERALD SHIPPING CORP. (LIBERIA),
Defendant-Intervenor-Appellee,

and

—against—

MARDORF PEACH & CO. LTD.,
Defendant-Appellant.

APPEAL FROM UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF PLAINTIFF-APPELLEE, TRAMP SHIPPING CO., INC.

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Preliminary Statement

This brief is submitted solely on behalf of plaintiff below, one of six appellees here. Although liberal use will

be made of the incorporations by reference authorized by FRAP 28(i), plaintiff-appellee's tactical position in this litigation is unique: Tramp Shipping Co., Inc., is the shipowner herein ("Owner") seeking to recover for vessel damage from one or more of the other parties. The ultimate payor cannot be known until a long-delayed arbitration occurs.

Statement of Issue Presented

I. Where a vessel sustained damage while under its fifth subcharter, and where the governing charter party contained a written agreement to arbitrate, did the District Court err in consolidating the arbitration involving the fifth subcharterer with the other arbitrations from the owner through the fourth subcharterer?

Counterstatement of the Case

1. *Proceedings Below*

This is an action by the vessel Owner seeking a consolidated arbitration not only with the immediate charterer but with all five subcharterers of the vessel as well. (7-9a, 19a.)* Consolidation was supported by the original charterer, Gotaas Larsen A.S. ("Gotaas" or "Ch."); the first subcharterer, Emerald (S-1); the second subcharterer, Sanko Steamship Co., Ltd. ("S-2"); the third subcharterer, Parabola Shipping UK Ltd. ("S-3"), and the fourth subcharterer, Himoff Maritime Enterprises, Ltd. ("Himoff" or "S-4"). (See 65a.) Only the final subcharterer, Mardorf

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* Owner inadvertently omitted the first subcharterer in the Complaint, Emerald Shipping Corp. ("Emerald" or "S-1"). Emerald later intervened as a defendant. (See 52a.)

Peach & Co., Ltd. ("Mardorf" or "S-5"), objected to consolidation below.*

Mardorf is a persistent litigant. The propriety of consolidating the dispute between Himoff (S-4) and Mardorf (S-5) into the previously-consolidated disputes from Owner through Himoff (S-4) was repeatedly challenged by Mardorf and repeatedly confirmed by the District Judge.**

Mardorf first moved to dismiss the cross-claim of Himoff (but not the Complaint) for lack of personal jurisdiction; insufficiency of process, and insufficiency of service of process. (68-69a.) During oral argument of the dismissal motions, counsel for Mardorf stated:

> "This is a simple jurisdictional point here as far as Mardorff [sic] Peach is concerned at this stage." (114a.)

The Court denied the motions and found that extraterritorial service authorized by FRCP 4(i) occurred and was sufficient. (109a, 115a.)*** The Court also found that Himoff had made a sufficient written demand for arbitration with Mardorf. (106-108a, 113a; see 132-133a.) Leave was granted to Mardorf to move to reopen the Court's prior order compelling arbitration insofar as the order now applied to Mardorf. (115-116a.)

Undaunted, Mardorf moved anew for dismissal or, in the alternative, for reargument of its prior dismissal mo-

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* On a separate issue, Owner objected to and appealed from an order of the District Court as to the mechanics of arbitrator selection. (See 64-67a.) That issue has now been resolved, and Owner's appeal has been withdrawn. (See 226a.)

** Prior to Mardorf's appearance below, the Court held that consolidation of all disputes from Owner through S-4, the last subcharterer appearing at that time, was proper. (64-67a.)

*** The Court's written disposition of the dismissal motion appears as an endorsement on the motion papers. (117a.)

tion. (118-119a.) The Court adhered to its original decision, both as to jurisdiction and as to the sufficiency of Himoff's demand. (162-163a.) Receiving and considering Mardorf's evidence as to the propriety of consolidation, the Court found:

> "With respect to the question of common questions of fact and law, it is the court's conclusion that the warranties contained in clauses 6 and 25 in each of the charters, including the Mardoff [sic] Peach voyage charter, are identical and give rise to the common questions of fact and law." (163a.)

The Court rejected arguments that Mardorf was denied a substantial right to be heard separately; that Mardorf had been prejudiced by consolidation, and that an absence of privity made consolidation improper. (163a.) With the undoubted hope that it had finally determined the issue, the Court held:

> "In the interests of judicial and arbitrational economy, the prevention of possible inconsistent results, and the minimization of time and expense to the parties, the court in its discretion orders the consolidated arbitration." (164a.)

Mardorf again sought to litigate the issue of consolidation under the excuse of the intervening bankruptcy petition of Himoff, S-4. (178-187a.) The Trustee in Bankruptcy of Himoff, Lewis Kruger, appeared at oral argument and stated:

> "But with respect to Himoff, I would appear before this Court and ask that the arbitration proceed." (213a.)

The Court agreed (224a) and ordered all parties to "submit to a consolidated arbitration". (226a.) The matter has now finally reached this Court.

2. *Scope of Appeal*

This Court is not presented with the District Court's original order consolidating the following arbitrations (64-65a):

(a) Owner with Ch.

(b) Ch. with S-1.

(c) S-1 with S-2.

(d) S-2 with S-3.

(e) S-3 with S-4.

As to that consolidation, the District Court made the following findings of fact and conclusions of law:

> "In a case such as this, where all the charter parties contain identical terms and conditions except as to payment of hire, consolidation for hearing of the legal issues arising thereunder by a single panel of arbitrators would clearly spare both the court and the parties substantial cost and delay.
>
> * * *
>
> "The amended complaint in this action sounds in both negligence and contract with reference to the common covenant of safe port and safe berth. That issue, as well as the issue of damages, is common as between all defendants and the plaintiff. While defendants have argued that a separable issue exists between them with respect to indemnity, it is not beyond the realm of possibility that plaintiff [has] an interest in their ability to pay if and when liability is found to exist. The parties hereto, having agreed to arbitrate by their charters and sub-charters, are therefore hereby directed to participate in a consol-

idated arbitration proceeding of all the issues in the case." (65-66a.)

No appeal is pending from this order. Mardorf only appeals from subsequent orders which bring it into the previously-consolidated proceeding. (See 166-167a; 228-229a.) It is the law of this case that arbitration from Owner through S-4 is properly consolidated. (FRAP 3[a], 4[a], 5[a].)

3. *Facts*

As indicated more fully above, the District Court accurately found that all parties had agreed to arbitrate their differences; that each had demanded arbitration, and that the underlying charter parties were substantially similar. (See, *e.g.*, 64-67a; 106-108a; 113a; 162-164a.)

The ultimate factual issue was best put by Judge Haight (then counsel to Gotaas) at oral argument:

". . . to find out just what it was that happened in the Port of Churchill several years ago." (220a.)

Liability for that occurrence is alleged by Owner to rest on both Clause 6 and Clause 25 of each charter party. (8a.) Clause 6 of both the lead charter (12a; Owner-Ch.) and the Himoff-Mardorf subcharter (25a; S4-S5) contains the following identical safe-berth warranty:

"6. That cargo or cargoes be laden and/or discharged in any dock or at any wharf or place that Charterers or their Agent may direct, provided the vessel can safely be always afloat at any time of tide. . . ".

Mardorf takes great pains to point out that Clause *25* (safe-*port* warranty) of its subcharter is different from all other charter parties herein. (See Appellant's Brief,

pp. 6-9 and Point III; cf. 25-27a.)* Mardorf's argument misses the common question of fact presented by the safe-*berth* warranty of Clause 6 and relied on by the District Judge. (163a.) In view of the governing criteria for arbitral consolidation argued *infra*, Owner respectfully indicates the unchallenged importance of Clause 6 pursuant to FRAP 28(b).

Summary of Argument

Sufficient common questions of law *or* fact are present in this case to warrant consolidation of all arbitrations. The Owner has been and continues to be prejudiced by the extensive procedural delay in reaching the merits of this dispute.

ARGUMENT

I.

Consolidation of All Arbitrations Is Manifestly Proper and Unprejudicial.

From Owner's unique standpoint, the propriety of a fully consolidated arbitration is unquestionable. Common questions of fact obviously include: (a) whether damage occurred to its vessel; (b) if so, the extent of such damage; (c) what charter party (or parties) governed the voyage during which the damage occurred. Common questions of law obviously include: (a) the existence and scope of particular warranties in the applicable charter party (or

* Mardorf appears to argue that, although Clause 25 is identical in each charter party, a separate reimbursement agreement at Clause 34 of the Himoff-Mardorf charter removes the warranty. The District Judge found that the question was "for the arbitrators". (114a.)

parties); (b) the identity of the party (or parties) ultimately liable for any damage suffered. Mardorf misses the point by attempting to argue the *merits* of these questions; the proper test is whether the common questions exist. *Compañia Española de Petroleos, S.A.* v. *Nereus Shipping, S.A.*, 527 F.2d 966, 970, 974 (2 Cir., Dec. 12, 1975; *"Nereus"* hereafter); see *In re Vigo Steamship Corporation*, 26 N.Y.2d 157, 162 (1970; *"Vigo"* hereafter). The District Court has so held, both as to the five arbitrations not involving Mardorf (Owner through S-4) and as to Mardorf's written agreement to arbitrate (S-4 and S-5). (64-67a, 162-163a, 228-229a.)

Nor has Mardorf demonstrated any cognizable prejudice from consolidation. It has, after all, agreed to arbitrate the issues raised in this arbitration proceeding. (25-27a.) The fact that it envisaged a two-party arbitration at the time of its agreement does not demonstrate sufficient prejudice to outweigh the benefits of a consolidated arbitration. *Nereus, supra; Vigo, supra.*

Indeed, Owner has been severely prejudiced by the delays caused by Mardorf's hypertechnical objections to consolidation. Owner fervently joins in Judge Medina's concluding observation in *Nereus, supra:*

> "It is our hope that the parties will now get down to business." (527 F.2d at 976.)

II.

Owner Adopts All Other Arguments for Affirmance Raised by All Other Appellees.

To the extent consistent with Point I, *supra,* and pursuant to FRAP 28(i), Owner expressly adopts all arguments for affirmance raised by its co-appellees herein. An additional comment as to jurisdiction is offered in view of Mardorf's incomplete description of proceedings below.

Mardorf's challenge to the subject-matter jurisdiction of the District Court is both unclear and newly presented. Mardorf previously contested *in personam* jurisdiction over it upon the grounds of insufficient service of process under FRCP 4(i). (68-69a; 114a; 118-119a.) That jurisdictional issue is now apparently abandoned in favor of a newly-raised challenge to subject matter jurisdiction under the United States Arbitration Act. (See Appellant's Brief, Point VII.)

Without citation of authority, Mardorf appears to argue in the concluding paragraph of Point VII of its brief that the only possible basis for subject matter jurisdiction herein is the United States Arbitration Act. (Appellant's Brief, p. 26.) This argument ignores the jurisdictional allegation of the Complaint herein: "This is a case of admiralty and maritime jurisdiction . . .". (7a.) It also ignores the fact that there is no separate grant of subject matter jurisdiction under the United States Arbitration Act. 9 USC §4; *Hamilton Life Ins. Co. of New York* v. *Republic National Life Ins. Co.,* 291 F. Supp. 225 (SDNY, 1968), *aff'd.* 408 F.2d 606 (2 Cir. 1969).

Construing Mardorf's argument as a separate fresh attack on *in personam* jurisdiction does not impart effectiveness. First, there is no showing that the statute relied

on (9 USC §4) is jurisdictional in any way. Second, since Mardorf's argument is based on the status of Himoff (S-4), there can be no reasonable dispute that Himoff considered itself "aggrieved", within the meaning of the statute, by Mardorf's failure to arbitrate and demanded arbitration of Mardorf by letter and by its cross-claim in this action. (22-24a, 132a.)*

III.

FRAP 38 Sanctions Should Be Imposed Upon Mardorf.

Owner submits that this is a "frivolous" appeal within the meaning of FRAP 38. The only real issue below was the propriety of arbitral consolidation, a classic exercise of discretion. *Nereus, supra.* There was and is no evidence to indicate an abuse of discretion in consolidating an arbitration between subcharterers (S-4 and S-5) *into* the previously-consolidated, and presently unchallenged, arbitrations from Owner through the penultimate subcharterer (S-4).

Owner has been severely prejudiced by Mardorf's tactics. Two years have passed since the accident to its vessel in Churchill, and not one word of testimony has been taken in any forum. Mardorf's efforts to escape liability should be appropriately penalized under FRAP 38 by an award

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* Although self-characterized as jurisdictional, Mardorf's exact argument is less sweeping: since Himoff (S-4) did not make a written demand with the formality Mardorf deemed appropriate, the District Court was without power to order consolidation under 9 USC § 4. (Appellant's Brief, pp. 25-26.) Again, Mardorf's argument misses the mark. The source of the District Court's power to consolidate arbitrations is found in FRCP 42(a) and 81(a)(3) in view of the silence of the Federal Arbitration Act. *Nereus, supra.*

of double costs and attorney's fees.* *Oscar Gruss & Son* v. *Lumbermans Mutual Casualty Co.*, 422 F.2d 1278 (2 Cir. 1970), *Fluoro Electric Corp.* v. *Branford Associates*, 489 F.2d 320 (2 Cir. 1973).

CONCLUSION

For the reasons set forth above, the order appealed from should be affirmed, with costs and disbursements to all appellees. In lieu of affirmance, an order dismissing the appeal as frivolous should be entered. In either event, an award under FRAP 38 should also be made against Mardorf.

Dated: New York, New York
September 24, 1976.

Respectfully submitted,

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* Owner requests leave to submit evidence of attorney fee charges incurred through the date of oral argument if FRAP 38 sanctions are deemed appropriate. Owner has joined in the motion of Gotaas and Emerald for an order dismissing the appeal as frivolous or summarily affirming the District Court, which was "denied without prejudice to renewal before the panel to hear the appeal" on June 8, 1976. Owner hereby renews the motion.

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Brief IS HEREBY ADMITTED

THIS 27 DAY OF Sept. 1976

Edward F. [illegible]

Attorney(s) for

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